(1)

Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

THOMAS BAJA,

Petitioner,

v.

KENNETH DUCHARME, AND
CHRISTINE O. GREGOIRE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court erred in failing to hold an evidentiary hearing on petitioner's claim that he was denied a fair trial in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and his Sixth Amendment right to effective assistance of counsel, for failure to sufficiently develop the factual basis of his claim in state court proceedings within the meaning of 28 U.S.C. § 2254(e).

II. Whether the district court erred in failing to hold an evidentiary hearing on petitioner's claim that he was denied a fair trial in violation of his Sixth Amendment right to effective assistance of counsel, for failure to explain why the evidence needed to support his claim could not have been developed during the state proceedings, and for failure to offer any evidence or rationale to suggest that he was prejudiced by counsel's failure to offer a diminished capacity defense, thereby finding Baja's petition to fall short of the requirements of 28 U.S.C. § 2254(e)(2).

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II. Resolution of whether the district court is required to hold an evidentiary hearing is required where such failure defeats the purpose of the writ, and so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power 9

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PETITION FOR A WRIT OF CERTIORARI

Petitioner THOMAS BAJA, by and through his attorney Lana C. Glenn, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, filed on August 9, 1999, that gives rise to this petition is Published by Order of the Ninth Circuit, and reprinted in the Appendix. (App. A). By order filed on October 4, 1999, the Ninth Circuit denied the petition for rehearing and rehearing en banc. (App. B).

STATEMENT OF JURISDICTION

The Ninth Circuit delivered its Opinion on August 9, 1999. A petition for rehearing was denied on October 4, 1999. Pursuant to Supreme Court Rule 13.1, this petition is timely filed with the Clerk of this Court within 90 days after entry of the judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. V.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. Amend. VI.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, Sec. 1.

STATEMENT OF THE CASE

THOMAS BAJA is serving a sentence of life imprisonment without parole, having been convicted by jury verdict of two counts of aggravated first degree murder.

A petition for habeas corpus relief was filed by Mr. Baja, raising, *inter alia*, the issue that underlies the issue now presented for review before this Court, *e.g.*, ineffective assistance of counsel for failure to raise a diminished capacity defense at trial. The petition was denied, and the Ninth Circuit subsequently affirmed the denial.

On Appeal in the Ninth Circuit was the Judgment in Case No. 97-CV-434-JCC, entered on June 1, 1998, by the Honorable John C. Coughenour, United States District Court Judge, Western District of Washington, adopting the Report and Recommendation of David E. Wilson, United States Magistrate Judge. (App. D) A Notice of Appeal was timely filed on June 8, 1998, along with Request for Certificate of Appealability, which was subsequently issued by the Ninth Circuit. (App. C)

For purposes of clarification, the Court of Appeals, Division 1, State of Washington, in denying relief to Mr. Baja, set forth its reasoning which was all but ignored by the Western District Court in this case. (App. E, See specifically, last four (4) pages of Opinion)

Moreover, the State Courts had, for review, Mr. Baja's Supplemental Pro Se Brief, and a Personal Restraint Petition, which included Affidavits for consideration which related to the prejudice suffered by Mr. Baja, for failure of

his defense counsel to offer a diminished capacity defense. (App. F)

Finally, and not considered by the District Court, are the Affidavits of three (3) criminal defense attorneys in good standing with the Washington State Bar, attesting to the prejudice that resulted from such ineffective representation. (App. F)

Additionally, the record reflects that the district court had the following facts to consider on the petition for writ of habeas corpus:

Thomas Baja was charged by Information with two counts of aggravated murder. Both counts included the elements of premeditated intent. Defense counsel sought appointment of an expert in Post Traumatic Stress Disorder. (PTSD, henceforth). At trial, defense counsel relied solely, exclusively, upon the defense of insanity. No Instruction on Diminished Capacity was proposed by defense counsel.

However, prior to trial Joya Pfeiffer had been interviewed initially by defense counsel. Inquiries had also been made to counsel regarding defense counsel's consideration of pursuing a Diminished Capacity Instruction by state prosecutors. Tom Baja, himself had questioned his counsel regarding counsel's use of a diminished capacity defense. (App. F) It was clear that the theory of the defense was lack of intent and premeditation.

Tom Baja is a multiple tour Vietnam veteran who suffered from PTSD, not only on his return to civilian life, but during his service in the military; during his twenty (20) years of service he participated in numerous covert

operations. Many of the operations were not disclosed to the American public nor were records kept for public disclosure.

On the night of July 17, 1988 Tom Baja went on a military "recon" mission, resulting in the death of his wife and her boyfriend. Both the state and defense experts testified that Tom Baja suffered from PTSD.

The defense expert testified that the information provided to him during his evaluation of Mr. Baja was not inconsistent with Mr. Baja having experienced a dissociative episode on July 17, 1988. He further testified that if Mr. Baja was in a dissociative state, he was not fully aware of where he was and what he was doing on the night of the killings. Three other individuals testified regarding Tom Baja's mental state on the night of the killings.

One reported that Tom Baja appeared at his residence, and stated "[M]ission accomplished, sir", and then proceeded to talk as though he was debriefing a commanding officer. Based on his observations, Tom Baja had no concept of where he was " . . . [T]here was no right and wrong where he was at, he was in Vietnam."

Another testified that although Mr. Baja knew her well, when he appeared at her residence on that night, he was unclear about what had happened and did not even know that he knew her.

Likewise, a third individual who knew Tom Baja well, testified that on the night of the killings, after the incident, Tom Baja at that point in time, was "not here" but, rather was back in Vietnam. During the time that Mr.

Baja was at his residence, Mr. Baja talked of needing to "get out" and get back to Saigon. Mr. Baja talked to him "in code". The witness opined that, on that night, "[T]here was no right, there was no wrong, it was a mission that had to be accomplished, and that's what he did."

Absent a defense of Diminished Capacity or an Instruction on Diminished Capacity, Tom Baja was found Guilty on both counts by jury verdicts. After his conviction in the state court, Tom Baja filed a Pro Se brief, and Supplemental Pro Se briefs, arguing, *inter alia*, denial of his Constitutional Sixth Amendment right to effective assistance of counsel and due process of law in violation of the Fourteenth Amendment. Attached to a Supplemental brief was a letter from Mr. Baja with questions to his defense counsel, to which he received no response.

On direct appeal, Tom Baja effectively and sufficiently raised two (2) ineffective assistance of counsel allegations, including his attorneys' failure to assert a diminished capacity defense in addition to his insanity defense. The Court affirmed the convictions. However, the Washington Court of Appeals considered the second allegation, and voiced its concern, stating:

> Baja's alternative ineffective assistance allegation, which relates to his attorneys' failure to assert a diminished capacity defense, might have merit. That defense may well have been allowed in this case under the rule that a diminished capacity defense may be raised in the presence or absence of an insanity plea, so long

as it is supported by the evidence. *State v. Martin*, 14 Wn. App. 74, 75, 538 P. 2d 873 (1975), *review denied*, 86 Wn. 2d 1009 (1976).

Baja was charged with aggravated first degree murder. In addition to pleading not guilty by reason of insanity, he also specifically denied the aggravated first degree murder mental state element of intentional premeditation. Nevertheless, Baja's lawyers pursued only an insanity defense; Baja's attorneys did not seek a diminished capacity instruction and none was given to the jury, a defense that not does rebut a specific mental state, but instead focuses only on a defendant's inability to distinguish right from wrong and thus his or her ultimate culpability. *State v. Box*, 109 Wn. 2d 320, 329-330, 745 P. 2d 23 (1987).

Baja's lawyers' failure to pursue a diminished capacity defense therefore effectively limited the jury's verdict options to complete acquittal or conviction on the premeditated murder charges. *See generally State v. Gough*, 53 Wn. App. 619, 622, 768 P. 2d 11028, *review denied*, 112 Wn. 2d 1026 (1989), (explaining differences between diminished capacity and insanity defenses). **The wisdom of this narrowing of the jury's options is debatable, particularly given Baja's expert's opinion that it is very uncommon for a PTSD sufferer to have a comprehensive dissociate episode,** *i.e.*, to become insane. (Emphasis Added)

We do not, however, reach the merits of this ineffective assistance allegation. Nothing in the record indicates whether Baja's lawyers did not pursue a diminished capacity defense because they failed to adequately explore defenses other

> than insanity, [A lawyers' failure to conduct appropriate factual or legal investigations may be ineffective assistance of counsel], *State v. Thomas*, 109 Wn. 2d 222, 230, 743 P. 2d 816 (1987)], or because they simply rejected the defense for tactical reasons.
>
> Accordingly, review of this issue would only be appropriate through a personal restraint petition. (App. E)

Tom Baja then filed a Personal Restraint Petition, (hereafter PRP), in Division I, Washington State Court of Appeals, which included two (2) affidavits by Mr. Baja. (App. F)

Apart from the affidavits dated October 30, 1991 of Rebecca Roe and Pamela Mohr (both prosecutors involved in Thomas Baja's case) the record, formal and otherwise, is conspicuously silent as to what actions, if any, counsel for Mr. Baja took to investigate, research, or consider using diminished capacity as a result of documented PTSD in his defense of Tom Baja. (App. F)

The Affidavit of Tom Baja's ex-wife, offered in the Petition for Writ of Habeas Corpus, indicated that defense counsel talked with her prior to trial, in order to acquire both military and medical histories. She had expected to be called for trial but was never contacted again by Mr. Baja's counsel. Medical records submitted on the state court level reflect that Tom Baja was long ago referred from psychiatry for an evaluation for "Vietnam Syndrome" – aka Post Traumatic Stress Disorder ("PTSD"). Prison medical records reflect Tom Baja's ongoing struggle with PTSD, from the time of his arrival at the

Washington State Penitentiary in Walla Walla in March of 1989, through the present.

REASONS FOR GRANTING THE WRIT

Resolution of the question of whether a district court's failure to hold an evidentiary hearing on petitioner's claims is important to secure the proper application of fundamental Constitutional rights. Resolution of the question of whether a district court's failure to hold an evidentiary hearing on petitioner's claim is imperative where the district court ignored the inherent prejudice towards Mr. Baja for failure of his defense counsel to propose a diminished capacity defense at trial. Failure to remand for an evidentiary hearing defeats the purpose of the writ, and so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power.

The United States Supreme Court has held that the federal judiciary must resolve any factual dispute material to a claim appropriately raised in a habeas corpus petition and resolution of factual disputes requires an evidentiary hearing in most cases. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986). Consistent with Rule 8(a) of the Rules Governing § 2254 cases, the court must review the proceedings, along with any expanded record, and make a determination whether to hold an evidentiary hearing. (App. G)

In this case the factual dispute regarding use of a diminished capacity defense has not been resolved by the state court, although Mr. Baja developed the factual bases

of his claim as best he could under the circumstances. The evidence supports his claim as recognized by Division I Court of Appeals, State of Washington. There has never been a state court hearing to resolve the merits of the factual dispute.

Evaluation of this question begins with the seminal case of *Townsend v. Sain*, 372 U.S. 293 (1963). In *Townsend*, the Supreme Court reversed a district court's dismissal of a habeas corpus because the lower court improperly had refused to hold an evidentiary hearing on the petition. The Court identified a strong federal policy favoring hearings, because punishment obtained in violation of the Constitution is intolerable and the "opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." 372 U.S. at 322 (*citing Frank v. Mangam*, 237 U.S. 309, 345-50 (1915) (Holmes, J., dissenting)). "[H]earing power" must be broad because

> a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. 372 U.S. at 292.[1]

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[1] Congress later reaffirmed the presumption in favor of evidentiary hearings on potentially meritorious federal habeas corpus claims. *See* Advisory Committee Notes to Rule 7 and 8 ("by far the majority" of petitions that cannot be disposed of

Townsend and its progeny have set forth principles to guide the district court's determination whether to hold an evidentiary hearing regarding any habeas claims. First, the *Townsend* Court held that the court always has the authority to hold evidentiary hearings on habeas corpus claims. Second, the court identified six situations where such hearings are required:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend, 372 U.S. at 313.[2] The first, third, fourth, fifth and sixth factors are all present in this case and a hearing is mandatory.

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summarily "raise . . . issues that necessitate an evidentiary hearing").

[2] The Court revisited one aspect of the *Townsend* decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Discussing *Townsend*'s fifth circumstance (where "the material facts were not adequately developed at the state court hearing"), the Court held that a hearing is not *mandatory* unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom. The *Tamayo-Reyes* decision, however, does not detract from the conclusion that a hearing is required in this case. Cause and prejudice are shown here.

The Ninth Circuit's opinion – that Mr. Baja is not entitled to an evidentiary hearing – conflicts with this court's decision in *Townsend v. Sain*, 372 U.S. at 318 (1963). Therein, the Court announced the general rule that a federal evidentiary hearing is required if the habeas applicant did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. Here, there has been no full and fair hearing in a state court.

Even under this Court's ruling in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), which arguably limited the circumstances for an evidentiary hearing, Mr. Baja is entitled to a hearing. In *Tamayo-Reyes*, supra, the Court held that a habeas applicant is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulted from that failure. In *Tamayo-Reyes*, the Supreme Court held that an evidentiary hearing is not *mandatory* under *Townsend*'s fifth circumstance ("the material facts were not adequately developed at the state court hearing") unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom. *See Chacon v. Wood*, 36 F.3d 1459, 1465-66 (9th Cir. 1994). In all other regards, *Townsend* is good law. *See Id.*[3]

Keeney v. Tamayo-Reyes, supra, did not affect the *Townsend* holding with respect to the district court's

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[3] For this reason, Petitioner is *not* required to show cause and prejudice to obtain a hearing under the first, second, third, fourth, and sixth factors which were enumerated in *Townsend*. *See Chacon*, 36 F.3d at 1465-67 and nn. 3 and 7.

broad authority to consider **any** evidence relevant to a federal habeas petitioner's claim, and conduct an evidentiary hearing when necessary. *Seidel v. Merkle*, 146 F.3d 750, 98-Cal. Daily Op. Serv. 5648 (9th. Cir. 7-20-1998) (wherein the Ninth Circuit rejected the state's argument that the district court erred in granting Seidel an evidentiary hearing without first requiring him to demonstrate cause for his failure to develop the facts in state court and actual prejudice resulting from that failure). In *Seidel v. Merkle*, the court held where material facts are disputed the holding of a hearing is in the discretion of the district judge. *Id.*, citing *Townsend v. Sain*, at 311.

The core of due process is the right to notice and a meaningful opportunity to be heard. *LaChance v. Erickson*, ___ U.S.___, 118 S. Ct. 753, 756 (1998) (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985)) (Emphasis Added). In *United States v. Hayman*, 342 U.S. 205, 72 S. Ct. 263, 272 (1952), this Court held that "a hearing, as referenced in 2255 has obvious reference to the tradition of judicial proceedings". *Id.* at 272, n. 30 (citing *Morgan v. United States*, 298 U.S. 468, 480, 56 S. Ct. 906, (1936)). Furthermore, this Court recognized that a person on a motion under 2255 "denied an opportunity to be heard, 'has lost something indispensable' . . . " *Id.* at 272-273, n. 31 (citing *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 116, 54 S. Ct. 330, 336 (1934)). Although the action in this case fell under 28 U.S.C. § 2254, Mr. Baja has lost the indispensable right to due process.

The Fifth and Fourteenth Amendments state that a person cannot be deprived of liberty "without due process of law". U.S. Const. Amend. V, Amend. XIV. This

includes a "meaningful opportunity to be heard." *LaChance*, ___ U.S.___, 118 S. Ct. at 756. Here, the meaningful hearing should require the district court to receive testimonial and documentary evidence regarding the mental capacity of Tom Baja to form specific intent on the night of the killings and evidence from his trial counsel explaining his failure to raise a diminished capacity defense.

Absent an evidentiary hearing, neither the District Court, nor the Ninth Circuit Court of Appeals could make a proper determination of Mr. Baja's claim of denial of his right to a fair trial, for lack of effective assistance of counsel.

CONCLUSION

For the foregoing reasons, Mr. Baja respectfully requests this Court to grant the petition for writ of certiorari.

Dated this 2nd day of November 1999.

Respectfully submitted,

LANA C. GLENN
Counsel for Thomas Baja

Appendix

App. A: Ninth Circuit Opinion Affirming District Court's Denial of Petition for Writ of Habeas Corpus.....App. 1

App. B: Ninth Circuit Order Denying Petition for Rehearing and Rehearing en banc.....App. 13

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS BAJA, *Petitioner-Appellant,* v. KENNETH DUCHARME, Superintendent of Washington State Reformatory; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington, *Respondents-Appellees.*	No. 98-35594 D.C. No. CV 97-00434-JCC OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief District Judge, Presiding

Submitted July 12, 1999[1]
Seattle, Washington

Filed August 9, 1999

Before: Alfred T. Goodwin, Thomas M. Reavley[2] and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Goodwin

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[1] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[2] The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held that under amendments to 28 U.S.C. § 2254(e) contained in the Antiterrorism and Effective Death Penalty Act (AEDPA), an evidentiary hearing is not permitted when a habeas corpus petitioner does not develop the factual basis of a constitutional claim in state court and fails to provide a reason for not doing so.

In a personal restraint petition in the Washington Court of Appeals, appellant Thomas Baja did not present evidence to support his contention that his trial attorney had provided ineffective assistance by not asserting a diminished capacity defense. The Court of Appeals denied his petition on the ground that Baja could have, but failed to present a prima facie case by supporting his claim with evidence in the record, or by showing that admissible extra-record evidence would do so. The Supreme Court of Washington denied discretionary review.

On federal habeas corpus under § 2254, a magistrate ruled that no evidentiary hearing was required. The district court adopted the magistrate's recommendation to dismiss Baja's claim with prejudice.

On appeal, Baja contended that he was entitled to an evidentiary hearing as a matter of law because the record developed in the state court proceedings did not contain

sufficient evidence on which the magistrate could determine the merits of his ineffective assistance claim.

[1] The AEDPA amendments to § 2254 impose an express limitation on the power of a federal court to grant an evidentiary hearing, and have reduced the degree of the district court's discretion. [2] Under the amended statutory scheme, a district court presented with a request for an evidentiary hearing must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not and an evidentiary hearing might be appropriate, the court's first task is to ascertain whether the petitioner has failed to develop the factual basis of the claim in state court. If so, the court must deny a hearing unless the applicant establishes one of two narrow exceptions. If not, the court may consider whether a hearing is appropriate or required.

[3] The state Court of Appeals did not review the trial evidence or consider evidence outside the record because Baja failed to come forward with evidence of a colorable claim. The Washington Supreme Court denied discretionary review on the same ground. [4] No factual basis for Baja's ineffective assistance claim was developed.

[5] When an applicant has diligently sought to develop a factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, an evidentiary hearing in federal court will not be precluded. [6] State law not only permitted but required Baja to come forward with evidence to support his allegation that counsel was ineffective at trial, but he failed to do so. He therefore failed to develop the factual basis of

his claim in state court proceedings within the meaning of § 2254(e).

[7] When a habeas petitioner has failed to develop a factual basis for his claim in state proceedings and requests an evidentiary hearing in the district court, the petitioner must show that the claim relies on a factual predicate that could not have been previously discovered through the exercise of due diligence, and the underlying facts would establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

[8] A claim of ineffective assistance of counsel must allege that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability existed that but for counsel's error, the result of the proceedings, would have been different. Baja did not explain why the evidence needed to support his claim could not have been developed during the state proceedings. Furthermore, he did not offer any evidence or rationale to suggest that he was prejudiced by counsel's failure to offer a diminished capacity defense. Baja's petition fell short of the requirements contained in § 2254(e)(2).

COUNSEL

Lana C. Glenn, Spokane, Washington, for the petitioner-appellant.

Thomas J. Young, Assistant Attorney General, Olympia, Washington, for the respondents-appellees.

OPINION

GOODWIN, Circuit Judge:

Thomas Baja appeals the district court's denial of his petition for a writ of habeas corpus, brought under 28 U.S.C. § 2254. Pursuant to the Certificate of Appealability granted by this court under 28 U.S.C. § 2253(c)(3), we consider only whether the district court erred by not holding an evidentiary hearing on the petitioner's claim of ineffective assistance of counsel. Because the petitioner's claim fails to meet the requirements set forth in § 2254(e)(2), as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), we hold that the district court did not err, and therefore affirm the judgment.

PROCEDURAL BACKGROUND

Petitioner Thomas Baja was indicted in 1988 on two counts of aggravated first degree murder. At his trial, Baja did not seriously contest that he killed his estranged wife and a companion, but entered a plea of not guilty by reason of insanity. Defense counsel argued that Baja, a veteran of the Vietnam war who allegedly suffers from post-traumatic stress disorder, thought he was on a recon mission in Vietnam at the time of the crime. Counsel did not assert any theory of diminished capacity during the trial, and no instruction regarding diminished capacity was given to the jury. Baja was convicted on both counts and is presently serving a life sentence at a state detention facility in Washington.

After bringing several unsuccessful direct appeals in Washington state courts, Baja filed a personal restraint petition before the state Court of Appeals alleging ineffective assistance of counsel. Baja's petition was denied, and his request for discretionary review by the Supreme Court of Washington was also denied. Baja then filed the instant petition for a writ of habeas corpus in the district court, also alleging ineffective assistance of counsel.

The magistrate to whom the case was assigned determined, after reviewing the entirety of the record, that no evidentiary hearing was needed and recommended dismissal of the claim. The district court adopted the recommendation of the magistrate, and denied Baja's petition with prejudice.

STANDARD OF REVIEW

Under pre-AEDPA law, we reviewed for an abuse of discretion a district court's decision to deny a habeas petitioner's request for an evidentiary hearing. *Villafuerte v. Stewart*, 111 F.3d 616, 633 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 860 (1998). However, as amended by the AEDPA, 28 U.S.C. § 2254(e) now substantially restricts the district court's discretion to grant an evidentiary hearing. We review de novo whether 28 U.S.C. § 2254(e) removes from the district court's discretion the decision whether to grant or deny a request for an evidentiary hearing. *See, e.g., Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997). We review for clear error findings of fact made by the district court relevant to its decision. *Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996).

DISCUSSION

Baja contends that the record developed in the state proceedings did not contain sufficient evidence on which the magistrate could determine the merits of the ineffective assistance claim, and that he was therefore entitled to an evidentiary hearing as a matter of law. However, Baja has failed to establish that an evidentiary hearing was permissible, much less required, under the new statutory requirements contained in 28 U.S.C. § 2254(e), as revised by the AEDPA.[3]

The Fourth Circuit has aptly summarized the impact of the AEDPA revisions on a district court's decision to deny a request for an evidentiary hearing. *See Cardwell v. Greene*, 152 F.3d 331, 336-340 (4th Cir.), *cert. denied*, 119 S.Ct. 587 (1998). Before the enactment of the AEDPA, the decision concerning an evidentiary hearing with respect to a habeas petition was firmly committed to the discretion of the district courts, subject to some judicially-created limitations on that discretion. *Id.; see also Townsend v. Sain*, 372 U.S. 293 (1963), as modified by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The amendments contained in the AEDPA, by contrast, impose "an express limitation on the power of a federal court to grant an evidentiary hearing," *Cardwell*, 152 F.3d at 336, and have reduced considerably the degree of the district court's discretion. The amended statute now provides, in pertinent part:

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[3] Baja's petition was filed on March 19, 1997, after the enactment of the AEDPA.

> (e)(1) In a proceeding instituted by an applicant for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence and . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

Under the amended statutory scheme, a district court presented with a request for an evidentiary hearing, as in this case, must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the

> court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court." If so, the court must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in § 2254(e)(2)(A) & (B). If, on the other hand, the applicant has not "failed to develop" the facts in state court, the district court may

> proceed to consider whether a hearing is appropriate, or required under *Townsend*.

Cardwell, 152 F.3d at 337.

A. Factual Basis in the Record

Baja presented his claim of ineffective assistance of counsel to the state court by way of a personal restraint petition. The petition was denied by the state Court of Appeals on the ground that he failed to present a prima facie case of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court of Appeals apparently did not review evidence from the trial, or consider additional evidence outside the record, because Baja failed to come forward with evidence of a colorable claim. The Washington Supreme Court denied Baja's motion for discretionary review of the appeals court's decision on the same grounds.

In the absence of any evidentiary hearing or consideration of additional evidence presented on appeal to the state courts, no factual basis for Baja's ineffective assistance of counsel claim was developed. *See, e.g., United States v. Sitton*, 968 F.2d 947, 960 (9th Cir. 1992) ("Ineffective assistance claims are ordinarily reviewed only in collateral proceedings because such claims usually cannot be resolved without the development of facts outside the original record.").

B. Failure to Develop Factual Basis

Several of our sister circuits have considered the impact of a habeas petitioner's "failure to develop" a factual basis for a claim at the state court level, within the meaning of §2254(e)(2). We agree that "where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court." *Cardwell*, 152 F.3d at 337. *See also McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3d Cir. 1997); *see, e.g., Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997) (applying pre-AEDPA law, but asserting that if "the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing"). We therefore consider whether the absence of a factual basis for Baja's claim in this case was the result of a curtailed proceeding at the state level.

The state Court of Appeals properly found that, with respect to the claim of ineffective assistance of counsel presented in the personal restraint petition, Baja could make a prima facie case by supporting his allegation with evidence in the record, or by demonstrating that there was competent, admissible evidence with respect to facts outside the record that would support his allegations. *See In re Rice*, 828 P.2d 1086, 1092 (Wash. 1992) ("As a threshold matter, the petitioner must state in his petition the facts underlying the claim . . . and the evidence available to support the factual allegations. . . . [P]etitioner must state with particularity facts which, if proven, would

entitle him to relief."). State law not only permitted but required Baja to come forward with affidavits or other evidence, to the extent that his claim relied on evidence outside the trial record. Clearly, Baja had the opportunity in state proceedings to come forward with evidence to support his allegation that Counsel was ineffective at trial, but failed to do so. He therefore failed to develop the factual basis of his claim in state court proceedings within the meaning of 28 U.S.C. § 2254(e).

C. Requirements of 28 U.S.C. § 2254(e)(2)

Where a habeas petitioner has failed to develop a factual basis for his claim in state proceedings and requests the opportunity to do so in an evidentiary hearing before the district court, the petitioner must show that "the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence and . . . the facts underlying the claim would . . . establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2).

Baja has asserted that the failure of trial counsel to explore and research the use of a diminished capacity defense constituted ineffective assistance of counsel. A claim of ineffective assistance of counsel must allege that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *See Strickland*, 466 U.S. at 687. Baja has not explained why the evidence

needed to support his ineffective assistance claim could not have been developed during the course of the state proceedings. Furthermore, he has not offered any evidence or other rationale to suggest that he was prejudiced by Counsel's failure to offer a diminished capacity defense. Baja's petition falls far short of the substantial requirements contained in Section 2254(e)(2).

CONCLUSION

The district court committed no error under the amended statute when it denied Baja's request for an evidentiary hearing.

AFFIRMED.

APPENDIX B

FOR PUBLICATIONS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS BAJA, Petitioner-Appellant, v. KENNETH DUCHARME, Superintendent of Washington State Reformatory; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington, Respondents-Appellees.	No. 98-35594 D.C. No. CV 97-00434-JCC ORDER (Filed Oct. 4, 1999)

Before: GOODWIN, REAVLEY[1] and McKEOWN, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge McKeown has voted to deny the petition for rehearing en banc, and Judges Goodwin and Reavley recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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[1] The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS BAJA, Petitioner-Appellant, vs. KENNETH DUCHARME, Superintendent of Washington State Reformatory; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington, Respondents-Appellees.	) No. 98-35594)) DC# CV-97-434-JCC) Western Washington) (Seattle))) ORDER)) (Filed Jul. 7, 1998))

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of appealability is granted with respect to the following issue: whether the district court erred by not holding an evidentiary hearing on appellant's claim of ineffective assistance of counsel. *See* 28 U.S.C. § 2253(c)(3).

Appellant is granted leave to proceed in forma pauperis.

Appellant's opening brief is due August 24, 1998; appellees' brief is due September 23, 1998; the optional reply brief is due within 14 days after service of appellee's brief.

Because appellant is a prisoner proceeding in forma pauperis and not represented by counsel, appellant is not required to file excerpts of record. 9th Cir. R. 24-1.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS J. BAJA, Petitioner, v. KENNETH DuCHARME, Respondent.	CASE NO. C97-434C REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a state prisoner currently incarcerated at the Washington State Reformatory in Monroe, Washington pursuant to his 1988 convictions in King County Superior Court on two charges of aggravated first degree murder. On March 19, 1997, petitioner filed the instant petition for writ of habeas corpus in this court in which he asserts that he was denied effective assistance of counsel when his trial counsel failed to pursue a defense of diminished capacity and to request related jury instructions.

On October 28, 1997, this Court issued a Report and Recommendation recommending to Chief District Judge Coughenour that petitioner's federal habeas petition be dismissed on the grounds that petitioner had failed to properly exhaust his state court remedies and was procedurally barred from doing so. Chief Judge Coughenour concluded that petitioner had, in fact, properly exhausted

his federal habeas claims in the state courts and referred the matter back to this Court for further proceedings.

In light of Chief Judge Coughenour's January 8, 1998 Order of Reference, this Court, on January 28, 1998, issued an Order directing the parties to file supplemental memoranda addressing whether an evidentiary hearing was necessary and/or appropriate in this matter. The parties have now filed their supplemental memoranda and this matter is ready to proceed. This Court, having reviewed the entirety of the record, concludes that an evidentiary hearing is not required, that petitioner's single claim for relief should be denied, and that the matter should be dismissed with prejudice.

FACTUAL BACKGROUND

The Washington Court of Appeals, on petitioner's direct appeal of his conviction, summarized the facts of petitioner's case as follows:

> Baja was arrested at approximately 4 a.m. on July 18, 1988, for allegedly having shot and killed his estranged wife, Lorna Baja, and her companion, Brian Cole. Baja has never seriously disputed that it was he who fired the fatal shots; instead he alleges that he is not guilty by reason of insanity. Baja, a Vietnam Veteran, claims that he killed the victims while he was in a dissociative state, *i.e.*, a Vietnam "flashback". Baja has been diagnosed as having post traumatic stress disorder (PTSD).
>
> At the time of the killings, Baja and Mrs. Baja had been separated for approximately 7 months. During the course of the separation

Baja repeatedly threatened to kill Mrs. Baja, particularly if he were ordered to pay substantial child support. He also threatened to kill any man whom he found with Mrs. Baja. On some occasions, Baja talked of killing Mrs. Baja, having a shootout with police, and then escaping into the mountains.

In the days immediately proceeding the shootings, Baja became increasingly disturbed about his relationship with Mrs. Baja. On July 15, 1988, he attended a court hearing at which he was ordered to pay child support. Baja was so displeased that he refused to sign the order. On July 16, Baja purchased two guns.[1] Then, at about 8 p.m. on July 17, he called a friend, Bob Sporleder, and told Sporleder that he was going on a "recon" to Mrs. Baja's house. On a recon, Baja ordinarily would simply watch the house. On this evening, however, at approximately 10:45 p.m. he broke Mrs. Baja's sliding glass door, entered, and shot and killed Mrs. Baja and her visitor, Cole.

Baja then went to Sporleder's residence, where Baja announced "mission accomplished, sir", and talked as if he were de-briefing a commanding officer. He later went to another friend's home, where he acted as if he were in Vietnam and talked about getting to Saigon. Baja also returned to his own apartment sometime after the shootings.

Police apprehended Baja at about 1:30 a.m. on July 18. Baja remained in his truck for more

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[1] Baja ordered the weapons in May and June. He took possession of them on July 16 by paying the remaining $430 balance on their purchase price.

than 3 hours before finally surrendering. A subsequent inventory of the truck revealed several weapons, ammunition and camping gear. One of the weapons found was the pistol used to kill Mrs. Baja and Cole. Baja was charged with two counts of aggravated first degree murder. He pled not guilty by reason of insanity. The jury found Baja guilty as charged.

(Dkt. No. 17, Exhib. 2.)

DISCUSSION

The first matter that must be addressed is whether or not an evidentiary hearing is warranted in this matter. A careful review of the briefs of the parties, and the trial transcript, reveals that an evidentiary hearing is not required as petitioner's claims may be resolved by resort to the record now before the Court. It does not appear that petitioner could adduce any additional facts at an evidentiary hearing which would alter this Court's conclusion that petitioner's ineffective assistance of counsel claim is without merit.

Ineffective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness and, (2) that a reasonable probability exists that, but for counsel's

error, the result of the proceedings would have been different.

When considering the first prong of the *Strickland* test, judicial scrutiny must be highly deferential. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel's performance fell within the wide range of reasonably effective assistance. *Id.* The Ninth Circuit has made clear that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Campbell v. Wood*, 18 F.3d 662 (9th Cir.), *reh'g denied*, 20 F.3d 1050, *cert. denied*, 511 U.S. 1119 (1994) (quoting *Strickland*, 466 U.S. at 689). The second prong of the *Strickland* test requires a showing of actual prejudice related to counsel's performance.

The reviewing Court need not address both components of the inquiry if an insufficient showing is made on one component. *Strickland* 466 U.S. at 697. Furthermore, if both components are to be considered, there is no prescribed order in which to address them. *Id.*

The question before this Court is whether trial counsel's decision not to pursue a diminished capacity defense as an alternative to the insanity defense was either unreasonable or prejudiced the outcome of petitioner's trial.[2] The Washington courts have described "diminished

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[2] The record suggests that counsel considered the possibility of presenting a diminished capacity defense and rejected the idea. (*See* dkt. No. 1, Exhib. 13.)

capacity" as a mental disorder, not amounting to insanity, which prevents a defendant from possessing the mental state necessary to commit a given crime. *State v. Furman*, 122 Wn.2d 440, 454 (1993).

In *State v. Gough*, 53 Wash.App. 619 (1989), the Washington Court of Appeals discussed the difference between the defense of diminished capacity and the defense of insanity:

> Diminished capacity is distinguished from insanity because as a legal defense the latter has to do only indirectly, if at all, with a specific mental state. The legal defense of insanity encompasses a host of mental disorders, some of which may presumably diminish capacity and some of which may not, but all of which operate to excuse the crime because of the particular quality of the impairment. *State v. Box*, 109 Wash. 2d 320, 329, 745 P.2d 23 (1987). Diminished capacity, on the other hand, allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished. It is apparent that a mental disorder may amount to insanity and also have a specific effect on the afflicted's capacity to achieve a culpable mental state. However, diminished capacity does not ipso facto follow from insanity. For example, one can be insane under the M'Naughton rule and still be capable of intending to accomplish a result defined by law as a crime. RCW 9A.08.010(1)(a); *Box*, 109 Wash. 2d at 326, 329, 745 P.2d 23.

Gough, 53 Wash. App. at 622.

A careful review of the trial record reveals that counsel's failure to pursue a diminished capacity defense at trial was neither unreasonable nor prejudicial to petitioner. The theory of petitioner's defense at trial, as laid out by petitioner's counsel in his opening arguments, was that petitioner did not act with intent and premeditation in committing the murders and that, even if the State did prove that petitioner committed some degree of homicide[3], petitioner could not, on the night of the homicides, appreciate the quality of his act. (Dkt. No. 17, Ex. 17 at 69.) Counsel represented to the jury that petitioner was a Vietnam veteran who suffered from post-traumatic stress disorder and who, on the night of July 17, 1988, went on a military "recon" mission during which he could not tell right from wrong. (Dkt. No. 17, Exhib. 17 at 79-80.)

Consistent with the theory presented in opening argument, petitioner's counsel adduced testimony at trial from petitioner's expert witness, psychologist Dr. Hannan Berman, concerning petitioner's Vietnam experiences and petitioner's mental condition. Through Dr. Berman, counsel was able to present petitioner's story without subjecting petitioner to cross-examination by the State.

Dr. Berman testified extensively regarding petitioner's 20 years in the military which, according to what petitioner told Dr. Berman, included multiple tours of duty in Vietnam and participation in covert operations during the Vietnam war. (Dkt. No. 17, Exhib. 21 at

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[3] The jury was instructed on aggravated first degree murder, first degree murder, or second degree murder. (Dkt. No. 24, Instructions, 4-7 and 9-12.)

616-633.) Dr. Berman also testified about the trauma associated with many of petitioner's reported Vietnam experiences, about the family stresses petitioner was under, and about petitioner's memories regarding events on the night of the murders. (Dkt. No. 17, Exhib. 21 at 633-634 and 658-660.)

Dr. Berman opined that petitioner did, in fact, suffer from post-traumatic stress disorder. (Dkt. No. 17, Exhib. 21 at 612.) In addition, although he could not say with any certainty that petitioner did or did not have a dissociative episode which caused him to believe he was on a military mission in Vietnam on the night of the murders, Dr. Berman testified that the information provided to him by petitioner, was not inconsistent with petitioner having experienced a dissociative episode. (Dkt. No. 17, Exhib. 21 at 662-663. Dr. Berman further testified that, if petitioner was, in fact, in the kind of dissociative state that he reported to Dr. Berman, it is possible that petitioner was not fully aware of where he was and what he was doing on the night of the murders. (Dkt. No. 17, Exhib. 21 at 665.)

In addition to the testimony of Dr. Berman, petitioner's counsel also adduced testimony from three different defense witnesses regarding petitioner's mental state on the night of the killings. Robert Sporleder, a friend of petitioner's testified that, at approximately 11:30 p.m. on July 17, 1988, petitioner appeared at his residence, stated "mission accomplished sir", and then proceeded to talk as though he was debriefing a commanding officer. (Dkt. No. 17, Exhib. 21 at 565-566.)

Mr. Sporleder further testified that, based upon his own observations and the way petitioner reported to him that night, he could "very easily think that [petitioner] had a flashback and he had no concept of where he was at except that he – I mean, there was no right and wrong where he was at, he was in Vietnam, something triggered, and he did what he was trained for." (Dkt. No. 17, Exhib. 21 at 573.)

Mr. Sporleder's wife, Cynthia Sporleder also testified on behalf of petitioner. Ms. Sporleder's testimony was consistent with that of her husband regarding petitioner's appearance and actions on the night of the murders. (*See* Dkt. No. 17, Exhib. 22 at 30-34.) Ms. Sporleder also testified that, in her opinion, given her experience as a registered nurse, petitioner did not know who the Sporleders were at the time he appeared at their residence on the night of July 17, 1988, that petitioner did not appear to be clear about what had happened that night, and that it did not appear that petitioner could distinguish right from wrong. (Dkt. No. 17, Exhib. 22 at 34-35.)

Petitioner's counsel also called Dale Dunks, Sr. an acquaintance of petitioner's. Mr. Dunks testified that petitioner came to his house at approximately 12:15 a.m. on July 18 and that petitioner, at that point in time, was "not here" but, rather was back in Vietnam. During the time that petitioner was at Mr. Dunks' residence, petitioner talked of needing to "get out" and to get back to Saigon. (Dkt. No. 17, Exhib. 21 at 708.) Mr. Dunks testified that petitioner talked to him "in code" and opined that, on that night, "[t]here was no right, there was no wrong, it was a mission that had to be accomplished, and that's what he did." (Dkt. No. 17, Exhib. 21 at 709.)

All of this testimony, adduced by petitioner's counsel at trial, supported petitioner's theory that, on the night of the murders, petitioner suffered from insanity resulting from his post-traumatic stress disorder. Petitioner thought he was in Vietnam and was doing what he was trained to do.

The State, however, offered a different perspective for the jury to consider. The State presented substantial and compelling evidence that the murders were intentional and premeditated. The state offered a great deal of testimony from acquaintances and co-workers of petitioner's regarding petitioner's anger with his wife and with the prospect that he would be required to pay child support. State's witnesses testified that petitioner threatened on many occasions to kill his wife. (*See* Dkt. No. 17, Exhib. 18 at 102-104, 108-109, 118-119, 123-124, 126-127, 134-135, 151.) State's witnesses also testified that petitioner had threatened to shoot his wife's boyfriend as well. (Dkt. No. 17, Exhib. 18 at 124.)

In addition to the evidence of threats made against his wife and her boyfriend, the State also adduced testimony that petitioner, on one occasion, snuck over to his wife's house and slashed her tires "because she deserved it" and that he occasionally spied on her. (See Dkt. No. 17, Exhib, 18 at 120; Exhib. 19 at 206-208, 211, 215, and 229.)

The state also offered evidence that petitioner purchased two weapons, a .45 and a shotgun, on the day prior to the murders, that petitioner asked his son to let him into the house on the night of the murders, and that, during his stand off with police, petitioner stated that he should have used a different weapon when he was

advised, incorrectly, that his wife and Mr. Cole were alive. (Dkt. No. 17, Exhib. 18 at 181; Exhib. 19 at 259; and, Exhib. 21 at 547.)

In light of the ample evidence of premeditation and intent presented by the state, counsel's decision not to pursue a diminished capacity defense was a reasonable strategic choice. Even assuming that petitioner's decision not to pursue a diminished capacity defense as an alternative to insanity was unreasonable, petitioner has not established prejudice. As described above, there was substantial and compelling evidence offered by the State that the offenses were intentional and premeditated. Nothing in the record suggests that a diminished capacity defense would have altered the outcome of the trial.

Accordingly, I recommend that petitioner's petition for writ of habeas corpus be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 12th day of April, 1998.

/s/ David E. Wilson
David E. Wilson
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS J. BAJA, Petitioner, v. KENNETH DuCHARME, Respondent.	CASE NO. C97-434C ORDER DENYING § 2254 PETITION

The Court, having reviewed the petition for habeas corpus, the Report and Recommendation of Judge David E. Wilson, United States Magistrate Judge, and the remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's petition for writ of habeas corpus (Dkt. No. 1) is DENIED with prejudice.

(3) The Clerk is directed to send copies of this Order to petitioner, to counsel for respondent, and to Judge Wilson.

DATED this ___ day of _____, 1998.

/s/ _____
JOHN C. COUGHENOUR
Chief United States
District Judge

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THOMAS BAJA, Appellant.	)))))))	No. 23660-1-I DIVISION ONE FILED: JAN 7 1991

WINSOR, J.* – Thomas Baja appeals a judgment and life sentence for two counts of aggravated first degree murder. We affirm.

Baja was arrested at approximately 4 a.m. on July 18, 1988, for allegedly having shot and killed his estranged wife, Lorna Baja, and her companion, Brian Cole. Baja has never seriously disputed that it was he who fired the fatal shots; instead he alleges that he is not guilty by reason of insanity. Baja, a Vietnam Veteran, claims that he killed the victims while he was in a dissociative state, *i.e.*, a Vietnam "flashback". Baja has been diagnosed as having post traumatic stress disorder (PTSD).

At the time of the killings, Baja and Mrs. Baja had been separated for approximately 7 months. During the course of their separation Baja repeatedly threatened to kill Mrs. Baja, particularly if he were ordered to pay child

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* Judge Robert W. Winsor was a member of the Court of Appeals at the time oral argument was heard on this matter. He is now serving as a judge pro tempore of the court pursuant to CAR 21(c).

support. He also threatened to kill any man whom he found with Mrs. Baja. On some occasions, Baja talked of killing Mrs. Baja, having a shootout with police, and then escaping into the mountains.

In the days immediately preceding the shootings, Baja became increasingly disturbed about his relationship with Mrs. Baja. On July 15, 1988, he attended a court hearing at which he was ordered to pay substantial child support. Baja was so displeased that he refused to sign the order. On July 16, Baja purchased two guns.[1] Then, at about 8 p.m. on July 17, he called a friend, Bob Sporleder, and told Sporleder that he was going on a "recon" to Mrs. Baja's house. On a recon, Baja ordinarily would simply watch the house. On this evening, however, at approximately 10:45 p.m. he broke Mrs. Baja's sliding glass door, entered, and shot and killed Mrs. Baja and her visitor, Cole.

Baja then went to Sporleder's residence, where Baja announced "mission accomplished, sir", and talked as if he were de-briefing a commanding officer. He later went to another friend's home, where he acted as if he were in Vietnam and talked about getting to Saigon. Baja also returned to his own apartment sometime after the shootings.

Police apprehended Baja at about 1:30 a.m. on July 18. Baja remained in his truck for more than 3 hours before finally surrendering. A subsequent inventory of

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[1] Baja ordered the weapons in May and June. He took possession of them on July 16 by paying the remaining $430 balance on their purchase price.

the truck revealed several weapons, ammunition and camping gear. One of the weapons found was the pistol used to kill Mrs. Baja and Cole.

Baja was charged with two counts of aggravated first degree murder. He pled not guilty by reason of insanity. The jury found Baja guilty as charged.

RIGHT TO SURREBUTTAL CLOSING ARGUMENT

Baja first contends that the trial court erred when it denied his request to give surrebuttal closing argument limited to the issue of insanity. He argues that such argument should be allowed because a defendant in an insanity defense case has the burden of proving his or her insanity by a preponderance of the evidence.

The only Washington opinion addressing the sequence of closing arguments in an insanity defense case was decided in 1913. *See State v. Harris*, 74 Wash. 60, 65-66, 132 P. 735 (1913). The *Harris* court held that in an insanity case it is not error to permit the prosecuting attorney to open and close argument to the jury. The court reasoned that although a defendant has the burden of proof on the insanity issue, the principal burden of proof is still on the State, because the main trial issue is defendant's guilt or innocence. Unless it has become incompatible with current conditions and thinking, *Harris* is binding on this court. *See Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 700-701, 756 P.2d 717 (1988); *Wyman v. Wallace*, 15 Wn. App. 395, 548 P.2d 71 (1976), *aff'd*, 94 Wn.2d 99, 615 P.2d 452 (1980).

Harris is not incompatible. Most jurisdictions that have recently addressed the issue have held that a defendant's reliance on an insanity defense does not affect the number or sequence of closing arguments. *See, e.g., United States v. Byrd,* 834 F.2d 145, 147-48 (8th Cir. 1987); *People v. Engram,* 193 Ill. App. 3d 511, 549 N.E.2d 1333, 1340 (1990); *Green v. State,* 469 N.E.2d 1169, 1172-73 (Ind. 1984); *State v. Pittman,* 668 S.W.2d 144, 147 (Mo. App. 1984); *State v. Hankins,* 232 Neb. 608, 441 N.W.2d 854, 875 (1989); *State v. Battle,* 322 N.C. 69, 366 S.E.2d 454, 458, *cert. denied,* 487 U.S. 1220 (1988); *State v. Baker,* 120 N.H. 773, 424 A.2d 171, 173 (1980).[2] Accordingly, we must follow *Harris* and affirm the trial court's ruling.

CONFRONTATION CLAUSE

Baja next contends that his constitutional right to confrontation was violated when the trial court admitted certain hearsay statements attributed to a 6-year-old child

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[2] A few courts, however, do not follow this rule. Pursuant to statute, Texas courts allow defense rebuttal argument on insanity when trial has been bifurcated and the only issue before a jury is whether defendant was insane; defense rebuttal is not allowed when insanity is tried in connection with the underlying charge. *Knoeppel v. State,* 382 S.W.2d 493, 494-95 (Tex. Crim. 1964). Even without bifurcation, a trial judge in Maryland has discretion to allow the defense to address the jury last on the issue of criminal responsibility when defendant's criminal responsibility is the only contested issue. *McCloud v. State,* 317 Md. 360, 564 A.2d 72, 74-76 (1989). California also leaves the sequence of argument in insanity cases to the trial court's discretion. *People v. Webb,* 143 Cal. App. 2d 402, 300 P.2d 130, 143 (1956); *People v. Jones,* 225 Cal. App. 2d 598, 37 Cal. Rptr. 454, 466 (1964).

who witnessed the shootings. *See generally State v. Robinson*, 44 Wn. App. 611, 616-17, 722 P.2d 1379, *review denied*, 107 Wn.2d 1009 (1986). Baja asserts that before admitting the statements, the trial court should first have determined whether the child was competent when he made them. The State responds that the statements were properly admitted as excited utterances and, therefore, no confrontation clause violation occurred. The State is correct.

The statements at issue were made by one of Mrs. Baja's children, 6-year-old Steven. After the shootings, Steven ran to the home of a neighbor, Delores Moritz, and told her that Baja shot Cole and Mrs. Baja and they were dead. Shortly thereafter, Steven allegedly told another neighbor, Vicky Myers, that before breaking through the glass door, Baja had asked Steven to let him in through the window. Steven's statements were put into evidence, without objection, through the testimony of Moritz and Myers.

As a general rule, admission of hearsay does not violate confrontation rights if: (1) the hearsay declarant is unavailable; and (2) the statements are reliable. *State v. Ryan*, 103 Wn. 2d 165, 170, 691 P. 2d 197 (1984); *State v. Robinson*, 44 Wn. App. 611, 617, 722 P.2d 1379, *review denied*, 107 Wn.2d 1009 (1986). Only the reliability requirement is at issue here.[3] " 'Reliability can be inferred

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[3] Based on advice from Steven's psychologist, the parties stipulated during trial that Steven was "psychologically unavailable." Moreover, unavailability need not be shown when, as here, the hearsay statement is an excited utterance. *State v. Palomo*, 113 Wn.2d 789, 799, 783 P.2d 575 (1989), *cert. denied*, 111 S. Ct. 80 (1990).

without more in a case where the evidence falls within a firmly rooted hearsay exception.' " *Ryan*, 103 Wn.2d at 170 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)). One such "firmly rooted hearsay exception" is that for excited utterances. *Robinson*, 44 Wn. App. at 620. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). The statement need not be contemporaneous to the startling event, nor need it be completely spontaneous. *State v. Hieb*, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *rev'd on other grounds*, 107 Wn.2d 97, 272 P.2d 239 (1986).

Here, Steven's statements to Moritz and Myers were made shortly after the shootings. Steven was crying when he spoke to Moritz and, according to Myers, he was still "excited" when he talked with her. Given the extreme nature of the startling event – the shooting of his mother – and the short amount of time that elapsed between the event and Steven's statements, we are convinced that the statements at issue are excited utterances.[4] As such, their admission into evidence did not violate the confrontation clause.

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[4] Indeed, Baja conceded this point at trial. During subsequent argument concerning the scope of cross examination, Baja referenced Myers' and Moritz' testimony about Steven's statements, noting that "[i]t was admissible as excited utterance."

ADMISSIBILITY OF IMPEACHMENT EVIDENCE UNDER ER 806

Baja also contends that it was error for the trial court to refuse to allow him to question a police witness about one aspect of Steven's June 20 police statement. While cross examining the detective who interviewed Steven, Baja sought to establish that Steven said nothing to the detective about Baja's alleged request to be let in through the window. Baja wanted to pursue this line of questioning to discredit Myers' window testimony.[5]

The State objected to Baja's attempted cross examination. Outside the presence of the jury, the following exchange occurred:

> [BAJA'S ATTORNEY]: Your Honor, the State has elected to not have this witness [Steven] testify and has introduced a great number of hearsay statements by him.
>
> THE COURT: Were they objected to?
>
> [BAJA'S ATTORNEY]: No, Your Honor, but once they have introduced them, we are entitled to introduce inconsistent statements. He [Steven] gave a full interview to this officer on July 20th, and he gave his full version and it was taken down by this officer in a report that he prepared. And, also, the State has asked specific questions to Dr. Berman regarding, well, if that's true, and suggesting that when they are

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[5] Myers' window testimony was quite damaging to Baja's insanity defense. Baja's own expert, Dr. Berman, admitted on cross examination that if Baja had asked Steven to let him in, that fact would argue against Baja having been in a dissociative state when he killed Mrs. Baja and Cole.

putting on hearsay statements, and we believe it's very similar to a prior inconsistent statement because it's as if the speaker is in the courtroom testifying. We have prior inconsistent statements by that same witness.

THE COURT: Well, first, statements by attorneys do not constitute evidence and they can use hypotheticals which they believe are appropriate. Of course, the jury will be instructed that statements, remarks, comments by attorneys, are not evidence and are not to be considered as such.

Now, if hearsay evidence came in and there was no objection, that's the way it is. It's in. Now that doesn't mean that therefore the other side can come in and say, well, because that other testimony came in therefore, now, we can go ahead with hearsay. I don't know of any authority which allows me to do that.

[BAJA'S ATTORNEY]: Okay.

THE COURT: It's a gamble you take.

[BAJA'S ATTORNEY]: It was admissible as excited utterance. We don't believe there was an objection to the prior –

PROSECUTOR: If counsel wants the entire interview that took place on the 20th to come in, I have no problem with that. However, I don't think he does. He wants one little section.

[BAJA'S ATTORNEY]: We just wanted the inconsistent statements.

THE COURT: That takes care of it then.

Baja now assigns error to this ruling. He makes two arguments in support of the admissibility of the omissions in Steven's police statement. First, Baja contends that the omissions were admissible to impeach Myers' testimony. This contention was not made below, and therefore will not be addressed on appeal. ER 103(a); RAP 2.5 (a); *see also State v . Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Second, in accord with his argument at trial, Baja asserts that under ER 806, the omission testimony was admissible to impeach Steven.

ER 806 provides that when a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked by any evidence that would have been admissible had the declarant testified as a witness, and that a declarant's inconsistent statement or conduct may be used to attack his or her credibility.[6] No Washington case interpreting ER 806 has been located. Because the rule is the same as Fed. R. Evid. 806, however, federal cases are of assistance in applying the rule. *E.g., State v. Burton*, 101

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[6] The rule provides in full:

"When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross examination."

Wn.2d 1, 6, 9, 676 P.2d 975 (1984) (proper to look to federal interpretations of federal evidence rule that is identical to Washington's rule), *overruled on other grounds in State v. Brown*, 113 Wn.2d 520, 545, 782 P.2d 1013, 787 P.2d 906, 80 A.L.R.4th 989 (1989).

Federal courts asked to apply Fed. R. Evid. 806 focus on whether the evidence sought to be admitted is in fact inconsistent with the hearsay testimony already admitted. *E.g., United States v. Wali*, 860 F. 2d 588, 591 (3d Cir. 1988); *United States v. Graham*, 858 F.2d 986, 990 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989).

> The trial judge has considerable discretion in determining whether testimony is "inconsistent" . . . inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.

United States v. Dennis, 625 F.2d 782, 795 (8th Cir. 1980) (interpreting inconsistency in conjunction with Fed. R. Evid. 801(d)(1)(A)); *see also Graham*, 858 F.2d at 990 (rule 806 ruling will be overturned only for abuse of discretion).

We need not, and can not, determine whether the trial court abused its discretion here. Steven's police statement is not part of the record before this court, nor were its contents described in any detailed offer of proof made to the trial judge. Indeed, Baja refused the State's offer to admit the entire statement into evidence. Without Steven's statement, we cannot ascertain whether the police statement's omission of the alleged window conversation was in fact inconsistent with Steven's statements to Myers, or whether the omission is simply a

result of the police statement being focused on the actual shootings, rather than on preliminary events. When a record is inadequate, a ruling excluding evidence ordinarily will not be overturned.

> [I]t is the duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer.

Tomlinson v. Bean, 26 Wn.2d 354, 361, 173 P.2d 972 (1946) (quoted in *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 617, 762 P.2d 1156 (1988)); *see also* 5 K. Tegland, Wash. Prac., *Evidence* § 12 at 55 (3d ed. 1989) (offer of proof should state answer expected to be elicited, explain why the evidence is admissible, and be sufficiently detailed and comprehensive to advise the court as to the evidence's admissibility). Moreover, even if the trial court's exclusionary ruling was error, that error was invited by Baja's refusal of the State's offer to admit the entire statement. A party cannot set up an error at trial and then complain of it on appeal. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984); *State v. Braxton*, 20 Wn. App. 489, 493, 580 P.2d 1116 (1978), *review denied*, 91 Wn.2d 1018 (1979). Thus, when a defendant makes a tactical choice in pursuit of some real or hoped for advantage, he or she may not later urge that action as a ground for reversing a conviction. *State v. Carpenter*, 52 Wn. App. 680, 683-84, 763 P.2d 455 (1988).

SCOPE OF CLOSING ARGUMENT

Next, Baja contends that the trial court improperly limited the scope of his closing argument by preventing him from arguing reasonable inferences from the lack of evidence. *See generally State v. Frazier*, 55 Wn. App. 204, 211-12, 777 P.2d 27 *review denied*, 113 Wn.2d 1024 (1989). His contention fails.

During closing, Baja tried once again to discredit Myers' testimony about Baja's request to be let in through Steven's window. To that end, he pointed out other evidence that contradicted Myers' assertion. Baja also said: "And then Detective Ostrander told you that he had a full interview with Steven Baja, and the State didn't seek to offer any evidence of that." The State objected to this argument "as going into legal issues that counsel is fully aware of." In response to that objection, the trial court admonished the jury that statements, comments and remarks made by counsel are not evidence; and that "the only evidence you do consider during the course of your deliberations in this case must have come from the mouths of the witnesses who were sworn and subject to cross-examination, and the evidence." Baja contends that this prevented him from arguing reasonable inferences from the lack of evidence.

We need not address Baja's contention because at trial, he neither made argument opposing the State's objection, nor objected to the trial court's ruling. Any alleged error in the court's ruling therefore has not been preserved for appellate review. ER 103(a); RAP 2.5(a).

In any event, the assignment of error is without merit. The State's knowing failure to call a witness or

present other evidence gives rise to an inference that the evidence was not favorable to the State only when it would have been natural for the State to produce the evidence if the facts contained therein were favorable to it. *See generally* 5 K. Tegland, *supra* at § 85.4 (cited in *Frazier*, 55 Wn. App. at 211); *State v. Mark*, 34 Wn. App. 349, 352-53, 661 P.2d 157, *review denied*, 100 Wn.2d 1007 (1983). No inference arises if a satisfactory explanation can be given for the missing evidence, *State v. Lopez*, 29 Wn. App. 836, 841, 631 P.2d 420 (1981), or if the evidence was equally available to both parties, *State v. Davis*, 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968).

All of these factors militate against an inference of unfavorable evidence here. The police statement was readily available to Baja, as well as to the State. Moreover, the State had good reason not to offer the statement into evidence: (1) it presumably was inadmissible hearsay, *see State v. Sellers*, 39 Wn. App. 799, 804-05, 695 P.2d 1014, *review denied*, 103 Wn.2d 1036 (1985) (detailed, complete description of a past completed affair is not an excited utterance); and (2) Baja had previously refused the State's offer to admit the entire statement into evidence.

PRE-ARREST STATEMENTS

Baja also argues that the trial court erred when it denied his pretrial motion to suppress incriminating statements that he made to police during the 3-hour standoff that preceded his arrest. He argues that the statements should have been suppressed as the product

of a police interrogation conducted before any *Miranda*[7] warnings were given. Baja emphasizes that his incriminating statements followed "false" communications by police. The statements at issue are:

(1) Baja's rejection of a police officer's "false" statement that if Baja surrendered he could be "PR'd". Baja said "you don't believe that after offing my wife and her lover," or words to that effect.

(2) Baja's comment that he should have used a different weapon, made after Baja asked whether the victims were dead and an officer "falsely" answered that he was not sure.

(3) Baja's comment that he "should have used a nine millimeter" pistol, made after Baja asked again whether the victims were dead or alive and a police officer "falsely" said that the last he knew, they were alive.

Under *Miranda*, a criminal suspect must be advised of his or her Fifth Amendment rights before any custodial interrogation by an agent of the State. Interrogation occurs when the police say any words or take any action that they know or should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); *State v. Stone*, 56 Wn. App. 153, 160, 782 P.2d 1093 (1989), *review denied*, 114 Wn.2d 1013 (1990). Whether the police words or actions were reasonably likely to elicit an incriminating response turns on the

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[7] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).

suspect's perceptions; the officer's subjective intentions are not at issue. *State v. Sargent,* 111 Wn.2d 641, 650-51, 762 P.2d 1127 (1988). Thus, "[t]he standard is an objective one, focusing on what the officer knows *or ought to know* will be the result of his words and acts." (Emphasis in original.) *Sargent,* 111 Wn.2d at 651.

No interrogation occurred here. Baja's incriminating statements about using a different pistol were made in response to answers provided by police to Baja's own questions about his victims' condition. Even if untrue or inaccurate, an officer's responsive statement about a victim's condition is not one that the officer would or should expect to elicit an incriminating response. The same is true of Baja's statement that he would not be released after "offing" his wife and her lover, made in response to a suggestion that he might be "PR'd". Accordingly, the trial court properly denied Baja's motion to suppress.[8]

SUFFICIENCY OF EVIDENCE

In a pro se supplemental brief Baja makes several arguments attacking the sufficiency of the State's evidence of his guilt. These arguments, which refer to the

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[8] The only case Baja cites in support of his unlawful interrogation claim is *Brewer v. Williams,* 430 U.S. 387, 399, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977). *Williams* is distinguishable because unlike the instant case, the detective in *Williams* deliberately sought inculpatory information from the suspect. The detective therefore knew that his conversation was reasonably likely to elicit an incriminating response.

State's failure to use blood tests, paraffin tests, or fingerprint analysis, are without merit.[9]

In reviewing the sufficiency of evidence to support a conviction, the relevant question is whether, after viewing the evidence most favorably to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *accord Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). The evidence here meets this test. That evidence includes: Steven's statements that Baja killed Mrs. Baja and Cole; evidence that one of the guns in Baja's possession at the time of his arrest was the gun used to kill the victims; evidence that this same gun was used to break the glass door into Mrs. Baja's home; and Baja's own inculpatory statements made during his standoff with police.

Baja also seemingly challenges the jury's rejection of his insanity defense. This challenge also is without merit. When a jury rejects an insanity plea, "some indulgence must be given the general and special verdicts of the jury," so long as they are "rendered upon conflicting, but competent, evidence." *State v. Schafer*, 156 Wash. 240, 252, 286 P. 833 (1930).

Here, there was substantial evidence from which the jury could conclude that Baja was not in the midst of a dissociative episode when he committed the murders.

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[9] Baja also argues that the trial court improperly limited closing argument addressing the absence of these means of proof. Baja fails to indicate where in the record this improper ruling occurred, and an independent review of the record reveals no such limitation. His argument must therefore fail.

This includes evidence of Baja's repeated threats to kill Mrs. Baja and any male companion, his anger following the child support hearing, and his deliberate "recon" or "patrol" of Mrs. Baja's house on the night of June 17. Moreover, although the two experts who testified at trial agreed that Baja most likely suffers from PTSD, the State's expert testified that Baja did not have a dissociative episode, and Baja's own expert was unwilling to say positively that Baja shot the victims while in a dissociative state:

> I am certainly not aware of anything that would be inconsistent with a dissociative episode. I can't say with any certainty that it did or didn't happen, but everything I have heard so far in at least not inconsistent with that.

Baja's expert also admitted on cross examination that most people with PTSD do not have a complete dissociative episode that renders them completely insane; and that although such complete dissociative states are possible, they are rare.

ASSISTANCE OF COUNSEL

Baja next makes two ineffective assistance of counsel allegations: one related to his attorneys' position that Baja should not testify at trial; and one related to his attorneys' failure to assert a diminished capacity defense in addition to his insanity defense.

A defendant asserting ineffective assistance of counsel must show both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80

L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Ordinarily an ineffective, assistance of counsel claim cannot be based on trial tactics and strategies. *E.g., State v. Woo Won Choi*, 55 Wn. App. 895, 905, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990).

Baja's contention that his attorney was ineffective because he persuaded Baja not to take the stand falls within the trial tactics exclusion to ineffective assistance claims. As the court explained in *State v. King*, 24 Wn. App. 495, 499, 601 P.2d 982 (1979):

> if a criminal defendant alleges in a . . . personal restraint proceeding that his attorney actually prevented him from testifying in his own behalf, it would appear proper to remand for an evidentiary hearing on this issue. This is in contrast to an allegation in a subsequent proceeding that defense counsel merely advised defendant against testifying as a matter of trial tactics. If defendant accepts this tactical advice and is not acquitted of the charges, he cannot later allege that he was denied effective counsel because he accepted the advice of his attorney and did not testify.

Accord State v. Peyton, 29 Wn. App. 701, 718, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981). Significantly, Baja does not claim that his attorneys actually prevented him from testifying. Instead, he alleges only that he eventually acquiesced in his attorneys' belief that "the absence of testimony [on] the defendant's part was the correct tactical procedure."

Baja's alternative ineffective assistance allegation, which relates to his attorneys' failure to assert a diminished capacity defense, might have merit. That defense may well have been allowed in this case under the rule that a diminished capacity defense may be raised in the presence or absence of an insanity plea, so long as it is supported by the evidence. *State v. Martin*, 14 Wn. App. 74, 75, 538 P.2d 873 (1975), *review denied*, 86 Wn.2d 1009 (1976).

Baja was charged with aggravated first degree murder. In addition to pleading not guilty by reason of insanity, he also specifically denied the aggravated first degree murder mental state element of intentional premeditation. Nevertheless, Baja's lawyers pursued only an insanity defense;[10] a defense that does not rebut a specific mental state, but instead focuses only on a defendant's inability to distinguish right from wrong and thus his or her ultimate culpability. *State v. Box*, 109 Wn.2d 320, 329-30, 745 P.2d 23 (1987). Baja's lawyers' failure to pursue a diminished capacity defense therefore effectively limited the jury's verdict options to complete acquittal or conviction on the premeditated murder charges. *See generally State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028, *review denied*, 112 Wn.2d 1026 (1989) (explaining differences between diminished capacity and insanity defenses). The wisdom of this narrowing of the jury's options is debatable, particularly given Baja's expert's opinion that it is very uncommon for a PTSD sufferer to

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[10] Baja's attorneys did not seek a diminished capacity instruction and none was given to the jury.

have a comprehensive dissociative episode, *i.e.*, to become insane.

We do not, however, reach the merits of this ineffective assistance allegation. Nothing in the record indicates whether Baja's lawyers did not pursue a diminished capacity defense because they failed to adequately explore defenses other than insanity,[11] or because they simply rejected the defense for tactical reasons. Accordingly, review of this issue would only be appropriate through a personal restraint petition. *King*, 24 Wn. App. at 504-06. Pursuant to RCW 10.73.090, any such petition must be filed within 1 year from issuance of the mandate.

The judgment and sentence are affirmed.

/s/ Winsor, J.

WE CONCUR:

/s/ Pekelis, J.

/s/ Baker, J.

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[11] A lawyer's failure to conduct appropriate factual or legal investigations may be ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987).

APPENDIX F

EXHIBIT 37

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THOMAS BAJA,	)	
Petitioner,	)	
vs.	)	**AFFIDAVIT OF**
KENNETH DuCHARME, Superintendent of Washington State Reformatory at Monroe Washington,	)	**PATRICK K. STILEY**
Respondent,	)	
and	)	
THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,	)	
Additional Respondent.	)	

STATE OF WASHINGTON)
) ss.
County of Spokane)

Patrick K. Stiley, being first duly sworn, upon oath deposes and says as follows:

1) I am an attorney duly licensed to practice before the Supreme Court of the State of Washington and all other courts in the State of Washington, as well as the Supreme

Court of the United States, the Ninth Circuit Court of Appeals and appropriate Ninth Circuit District Courts.

2) I have been licensed to practice, and have actively practiced in the field of criminal defense since 1971, in the City of Spokane, State of Washington.

3) I have tended to specialize in criminal defense in the areas of controlled substance act violations and murder charges since approximately 1973.

4) I have been defense counsel in several first and second degree murder, and kidnap cases in the State of Washington which immediately come to mind, all involved excessive use of intoxicants by the charged defendant at the time of the offense charge, or other evidence of inability to form specific intent.

5) In every case which come to mind, all prosecuted in accordance with the criminal laws of the State of Washington, I asserted, among other defenses, diminished capacity because of what I believed to be an arguable lack of capacity to form specific intent on the part of the defendant at the time of the crime charged.

6) In every instance which I recall (my memory may be selective, but I don't think so) the jury rendered manslaughter verdicts (in one degree or another), as requested and argued by the defense, or declined to convict on the charges requiring specific intent.

7) In none of the cases which come to my mind was the evidence inability to form specific intent as strong, and the evidence of lack of intent as strong, as that reflected in the evidence in *State of Washington v. Thomas Baja.*

8) In such instance, I secured medical evaluations of the defendant with particular attention to both psychological conditions and history, and degree of impairment and apparent effect.

9) I have reviewed selected trial testimony and medical records in the Baja case, although I have not reviewed the entire transcript. It is apparent to me from a review of these documents that the evidence therein would compel me to assert a diminished capacity defense in the Baja case, were I counsel in that matter at trial.

/s/ Patrick K. Stiley
PATRICK K. STILEY

SUBSCRIBED AND SWORN to before me this 10, of August, 1996.

[SEAL]

/s/ John E. Ruark
Notary Public in and for the State of Washington, residing at Spokane Commission Expires 12-1-97

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THOMAS BAJA, Petitioner, - vs - KENNETH DuCHARME, Superintendent of Washington State Reformatory at Monroe Washington, Respondent, and THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, Additional Respondent.	NO. AFFIDAVIT OF CARL MAXEY

STATE OF WASHINGTON)
: ss.
County of Spokane)

CARL MAXEY, being first duly sworn, upon oath deposes and says as follows:

I am an attorney duly licensed to practice before the Supreme Court of the State of Washington on February 26, 1951. I have also been admitted to practice before the

Ninth Circuit Court of Appeals and the United States District Courts of Washington.

I have a concentrated practice in the area of criminal defense. I have defended a very substantial number of persons on charges of First and Second Degree Murder over the last 45 years, a high number of whom suffered from mental disorders.

I have asserted, among other defenses, the defense of diminished capacity where the mental state arguably caused the defendant to lack the capacity to form a specific intent at the time the crime charged, which resulted in manslaughter verdicts of varying degrees, as requested and argued by the defense.

Having been fully advised of the facts of *State of Washington v. Thomas Baja*, I would have thought it mandatory to obtain a medical evaluation of the defendant with particular attention to obtaining an opinion with respect to diminished capacity and insanity to determine the existence of a defense in that regard.

/s/ Carl Maxey
CARL MAXEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27th day of August, 1996.

/s/ Debbieann Ericksen
NOTARY PUBLIC in and for the State of Washington, residing at Spokane
My commission expires:
10/10/96

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THOMAS BAJA,	)	
Petitioner,	)	
vs.	)	**AFFIDAVIT OF**
KENNETH DuCHARME, Superintendent of Washington State Reformatory at Monore Washington,	)	**MARK E. VOVOS**
Respondent,	)	
and	)	
THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,	)	
Additional Respondent.	)	

STATE OF WASHINGTON)
) ss.
County of Spokane)

Mark E. Vovos, being first duly sworn, upon oath deposes and says as follows:

1) I am an attorney duly licensed to practice before the Supreme Court of the State of Washington and all other courts in the State of Washington, as well as the Supreme Court of the United States, the Ninth Circuit

Court of Appeals and appropriate Ninth Circuit District Courts.

2) I have been licensed to practice, and have actively practiced since 1968 in the City of Spokane, State of Washington.

3) I have specialized in the practice of criminal defense.

4) I have been involved in at least eleven (11) Aggravated Murder cases and numerous First and Second Degree Murder charges in the State of Washington, including those involving mental disabilities or impairments or excessive use of intoxicants by the charged defendant at the time of the offense charged.

5) I have asserted, among other defenses, the defense of diminished capacity where the mental state or intoxication arguably caused the defendant to lack the capacity to form specific intent at the time of the crime charged, which resulted in Manslaughter verdicts (in one degree or another), as requested and argued by the defense.

6) Having acquainted myself with the facts in *State of Washington v. Thomas Baja,* I believe I would have secured a medical evaluation of the defendant, with particular attention to P.T.S.D., the psychological conditions, history and status for purposes of asserting not only an insanity defense but also for the defense of diminished capacity.

/s/ Mark E. Vovos
MARK E. VOVOS

SUBSCRIBED AND SWORN to before me this 15, of August, 1996.

[SEAL]

/s/ John E. Ruark
Notary Public in and for the
State of Washington, residing at
Spokane
Commission Expires 12-1-97

ATTACHMENT "A"

AFFIDAVIT

STATE OF WASHINGTON)
COUNTY OF WALLA)
WALLA)

AFFIDAVIT OF
THOMAS BAJA

I Thomas Baja declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge, and has been executed on this day.

When I first met the court appointed attorney at the King County Jail the day after my arrest (July 1988), he told me that he will be using the Temporary insanity defense. Later the same day, Tony Savage, another attorney, came in and wanted to take my case. He explained to me the difference between the Temporary Insanity and Diminished Capacity Defense. I could not afford his services. When my attorney (Terry Mulligan) came back, I asked him about the Diminished Capacity Defense. Without making any kind of investigation he said, "We would not use it", no reason was given.

My attorney Terry Mulligan informed me that I would have to talk with state doctor. I advised my attorney that I did not want to talk with him. Terry Mulligan said I had to or we could not use Temporary Insanity. Being ignorant towards court procedure, I was compelled against my wishes to talk with the state dr. I feel that my rights of self incrimination afforded by Amendment 5 to the U.S. Constitution were not protected. Had I steadfastly refused to talk with the state doctor, my attorney

would have been compelled to find a different plea (Diminished Capacity, Not Guilty, ETC)

Before the trial began I was tested by Dr Hannon Berman a leading psychologist in the field of combat related stress disorders. The results were that I had PTSD from serving in Viet Nam. Terry Mulligan made mention of this several times during the trial, but only by quick reference. At the conclusion of the trial, there were no jury instruction given that the jury could consider weather my PTSD prevented me from acting with knowledge. The judge even concurred that I suffered from PTSD.

An exploration of similar cases involving combat veterans who served in Viet Nam would have lead my attorney to consider other types of defense that were available (e.g. Diminished Capacity). His failure to do reasonable research resulted in a miscarriage of justice.

It is a fact that "Flashbacks" are a part of the PTSD profile. Other cases involving "flashbacks" show that temporary insanity is not necessarily the appropriate defense.

Due to my attorney lack of knowledge and failure to explore other avenues of defense, I was not afforded effective counsel. The inability to afford private counsel should not deny me the right to effective counsel. In this case, the court appointed attorney, for what ever reason, did not fully perform his job, and did not represent me to the best of his ability.

STATE vs LATZKE (unpublished, filed for public record, July 1989) is a similar case. Latzke suffered from

PTSD. His trial attorney failed to explore the diminished capacity defense, the appellate court over turned his conviction.

/s/ Thomas Baja
Thomas Baja
951519 1NC3
PO Box 520
Walla Walla
WA. 99362

Subscribed and sworn to before me
this 30th day of April, 1991
/s/ Illegible
Notary Public in and for the State
of Wash. residing at Walla Walla

ATTACHMENT "B"

AFFIDAVIT

STATE OF WASHINGTON	)	AFFIDAVIT OF
COUNTY OF WALLA	)	THOMAS BAJA
WALLA	)	

I Thomas Baja declare under penalty of perjury thet tha following statements within this affidavit are true and correct to the best of my knowledge, and has been executed on this day.

During my trial, I asked my attorney (Terry Mulligan) to let me get up on the witness stand and testify in my own behalf. I asked repeatedly; he told me he was not going to call me up on the stand, and "to forget it". I asked him if I could speak with the judge. I was told "it

was against court procedure." Terry Mulligan never gave me a reason why he would not call me up to testify.

I am a Viet Van veteran, who has PTSD. A lot of testimony was given by experts, who speculated on the events of July 1988. Had my attorney allowed me to testify in my own behalf, a lot of speculation and unanswered questions would have been cleared up. And the trial would have ended with a different verdict.

I am afforded the right to testify in my own behalf. This is guaranteed by the Washington State Constitution, Art 1 § 22, and by the Constitution of the U.S. 5th and 6th Amendments Art 1 §§ 3, 22. There have been two cases recently that state "The accused has the right to testify in his own behalf contrary to advise of counsel". See ROCK vs ARKANSAS, and U.S. vs MARTINEZ, also see Criminal Law § 46.3, 46.4

After the verdict came in, my attorney informed me that the jury foreman called him and told him that they had "a lot of questions for the judge" but did not ask them because they "knew" what he was going to say. My attorney never relayed this to the presiding judge

I have written to my trial attorney asking him why he did not let me testify, (See Attachment #1), I have not recived a reply to this date.

/s/ Thomas Baja
Thomas Baja
951519 1NC3
PO Box 520
Walla Walla
WA. 99362

Subscribed and sworn to before me
this 30th day of April, 1991
/s/ Illegible
Notary Public in and for the State
of Wash. residing at Walla Walla

EXHIBIT 13

Appendix C

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE PERSONAL PETITION OF THOMAS BAJA, Petitioner.	No. 28384-7 AFFIDAVIT OF REBECCA ROE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Rebecca Roe, being first duly sworn upon oath, deposes and states as follows:

1. I am an attorney certified to practice in the State of Washington. I am employed by the King County Prosecuting Attorney as a Senior Deputy Prosecuting Attorney.

2. I acted as the lead prosecutor during the December 1988, aggravated first degree murder trial of Thomas Baja.

3. During the trial the defendant was represented by Mr. Terry Mulligan and Mr. Michael Spearman. Mr. Mulligan acted as lead counsel.

4. On at least one occasion, perhaps more, during trial or shortly thereafter, I asked Terry Mulligan whether he considered diminished capacity. I do not recall his

precise answer; but, I do recall that he said he considered and rejected using diminished capacity.

/s/ Rebecca J. Roe
Rebecca Roe

SUBSCRIBED AND SWORN TO before me this 30th of October, 1991.

/s/ Suzanne E. Illegible
NOTARY PUBLIC in and for the State of Washington, residing at Seattle,
My commission expires 12/15/94.

Appendix O

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE PERSONAL PETITION OF THOMAS BAJA, Petitioner.	No. 28384-7 AFFIDAVIT OF PAMELA MOHR

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Pamela Mohr, being first duly sworn upon oath, deposes and states as follows:

1. I am an attorney certified to practice in the State of Washington. I am employed by the King County Prosecuting Attorney as a Deputy Prosecuting Attorney.

2. During August of 1988, I called Terry Mulligan to talk about Mr. Baja's personal restraint petition and his allegation of ineffective assistance of counsel.

3. Mr. Mulligan, citing attorney-client privilege, declined to talk with me about Mr. Baja's case.

/s/ Pamela Mohr
Pamela Mohr

SUBSCRIBED AND SWORN TO before me this 30 of October, 1991.

/s/ Barbara T. Wood
NOTARY PUBLIC in and for the State of Washington, residing at Seattle,
My commission expires 6/5/93.

EXHIBIT 36

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

THOMAS BAJA, Petitioner, vs. **KENNETH DuCHARME,** Superintendent of Washington State Reformatory at Monroe Washington Respondent, and **THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,** Additional Respondent.	**AFFIDAVIT OF JOYA L. PFEIFER**

STATE OF WASHINGTON)
) ss.
County of Spokane)

Joya L. Pfeifer being first duly sworn, upon oath deposes and says as follows:

I am over the age of 21 years and competent to make this statement. I am the ex-wife of Tom Baja, having been divorced from Tom Baja in 1980. I write this statement from personal knowledge and experience, freely and voluntarily.

I am starting with Mr. Mulligan's call to my parents, October 18, 1988, in order to contact me regarding Tom Baja. I know this date because my father had kept many calendar journals, much to my surprise, and had kept a few points on what Mr. Mulligan said.

He implied Tom was institutionalized with mental health problems. My dad relayed to him that he knew Tom had remarried and had children. Mr. Mulligan never told my dad that Lorna was dead or that Tom was arrested and in King County jail. My mother has since died, but she was in the room when my dad was on the phone.

The subject came up about whether Tom had any mental problems and P.T.S.D. Mom reacted and remarked that Tom had always refused any counseling and my dad relayed that back to Mr. Mulligan. My parents knew very little about Tom's interaction with the military regarding P.T.S.D. or many things I had observed. My mother was speaking of marriage counseling or help in our marriage. Tom and I had many marriage problems and neither one of us did well in the advice department, but this comment of refusing help with mental problems simply isn't true. So, when Mr. Mulligan called me, the same day, he already had this negative statement in his mind and never bothered to ask me.

I only found the date and brief notes about a month ago while my father was throwing out papers. I called my parents the same night to relay the terrible news of Lorna, her family and Tom's incarceration. My father relayed that when Tom and I were married, Tom suffered terrible nightmares, had periods of not being literally in

his own space, and times of withdrawal from others and depression. My dad seemed to understand Tom's lack of self-esteem and associated it with Tom's thinking he could have saved more men in Vietnam, or being a better NCO in the military. Later when Tom became a drill sergeant at North Fort Lewis, two young men Tom and I both knew died within two weeks of arriving in Vietnam and Tom's nightmares increased. He was being: tougher on the outside, but torn on the inside. The attitude of "I don't need friends, friends die," was something I became used to.

My dad at the time had much better insight than I and didn't speak to me much about it. I, on the other hand, did not really understand, and took too much of it on a personal level, and wasn't much help then or until we were divorced in 1980. My own alcoholism had a great deal to do with that until I finally realized in 1984 that I needed serious mental help myself. I have been clean and sober ever since. My illness in itself was a very negative factor and a critical reason for why we didn't get along. However, it is a very positive contributing factor in my total honesty with myself and critical to me and how I perceive and how I witnessed Tom's struggle with P.T.S.D.

I mention this illness because it has a lot to do with how I reacted to Mr. Mulligan's phone call to me the same day and my memories and conclusions were very different before 1984, and important on Tom's behalf.

The afternoon of October 18, 1988, Terry Mulligan called me, saying he was Tom's attorney, and arrested for

the killing of Lorna his wife and her boyfriend. That he was trying to obtain background on Tom.

He said that they couldn't find his army or medical records. At that time I thought that Tom was now a civilian probably living in Oregon or Washington State. He said Auburn, but was now in King County Jail Hospital in Seattle and charged with premeditated aggravated first degree murder. He said that it was a very serious crime and the prosecutor had wanted to give him the death penalty, but that capital punishment was voted out, and that Tom had been there since July. I wanted to know if he was receiving any help and he stated they were doing a psychiatric evaluation. He said he was withdrawn, non-talkative and not in very good physical shape. He didn't say what he meant by the physical shape. He said Tom did not remember doing it. He briefly said, he had killed Lorna and her boyfriend instantly at her home.

I asked if the children (Tom and Lorna's) were all right and hoped they were not there at the time. He didn't answer the question and said they were at relatives. I said "It was a terrible loss of life and the loss of Tom's life and future". I became concerned when he said "Tom will spend the rest of his life in prison". I said, "What about help for P.T.S.D."? His reply was probably not. I wondered if he was speaking on behalf of the prosecution or the defense.

I honestly told Mr. Mulligan that I believed it very possible that Tom didn't remember the incident. I also reiterated that I probably knew more about Tom's life than any other person alive and was willing to come and

testify on his behalf, or if not, to be there as moral support He said they would pay for the trip if they called me.

Tom's father Ludwig Baja died when Tom was sixteen, so his mother Julianna raised Tom, the oldest Alex, and Frank. She died in 1970 in Riverhead, Long Island, New York. Alex was in the military police and then became an accountant We only heard from his a few times over the years and no one knows where he is. Frank visited us twice. He went into the military and I thought he was living in Germany. However, he is now in Longmont, Colorado. Any relatives left are in Germany. Frank visited Tom when stationed in Ft. Louis.

After our divorce and through the years I no longer have papers, pictures or anything. However, I can talk about Tom's experiences in the military, medical care, or P.T.S.D. and mental suffering. So, as I stated to Mr. Mulligan I am a walking history book. Surely by what I said to him on the phone he would have been given positive evidence.

Something I considered very important was that Tom was in Vietnam twice. Before the first time in Vietnam, he was at Ft. Dicks for basic training, then Fort Bragg for paratrooper training. Then, Vietnam, serving as gunner on a helicopter. One helicopter was shot down and Tom pulled an officer from the wreckage, being wounded himself For this he received a purple heart. He earned his jump wings. On the second tour – Arvin Wings.

I mentioned also to Mr. Mulligan, two bronze stars for valor, as well as a Silver Star, which is only one down

from the Metal of Honor. There were two campaign ribbons and something for service in Korea before our divorce, and again in Korea after Tom married Lorna, before he became a civilian. He was also a Drill Instructor at North Fort Lewis as well as being in the military police. Tom had thought about becoming a police officer if he got out of service. He was an excellent mechanic and I had always hoped he would go to school and receive accreditation for his knowledge and pursue that field in his future. When I mentioned Tom's interest in becoming a police officer to Mr. Mulligan, he sounded shocked.

There were always plaques, awards metals and military paraphanelia around the house and in our quarters in North Fort Lewis and anywhere else we lived. We used a spare bedroom; it contained an army cot, field gear, large collection of empty shells, ammo belt, unarmed grenades, old British Enfield rifle, a collectors item, and an old 22 rifle on a gun rack, and army knives. This seemed to be pretty average to me and to many army or military families. We also had a very large family crest, wall mounted that had two crossed daggers on it. It was impressive. Anything that could cause harm was locked away, especially after our son Samuel Marshal was born November 6, 1971. He is now 25. This past paragraph I mention for two reasons:

1) This is a brief description of Tom's apartment at the time of the killings.

2) This picture of him was one of needing helping, and trying to avoid taking his own life. I know because I have been with him before.

When stationed at Fort Lewis after the second time in Vietnam, there was an incident at our home. I came home and found him coughing and waving his arm as if something was on fire or smoke present. There wasn't. Then he was yelling "I'll get to you" over and over. He had an army issued weapon and was yelling with his face tilted upward like aircraft in the air. When he realized where he was, he turned the pistol in his hand towards his own head. I remember screaming at him and he started to cry and stayed quiet in the room for a long time and was crouched in the corner of the room. There were many times when his nightmares included smelling sulfur or explosives and noise of helicopter blades. I then called his Company Commander who came to our quarters with a medic. Tom remembers none of this to this day. I asked him. He is very vague about Captain Smith, who Tom respected alot and Captain Smith him. He was hard to forget and his trooped called him Polar Bear.

Tom left with him, very confused and withdrawn with a haunting empty look in his eyes. Two young men that I also met were killed within two weeks of going to Vietnam that he trained. In Vietnam, Tom saw his best buddy's head blown off by a woman throwing a grenade into their tent. His Captain was very kind and told me later that he was putting Tom on light duty after the doctor's evaluation. He said that Tom was very paranoid and fearful of many people and needed treatment for P.T.S.D. Tom said that he had appointments to go to.

Mr. Mulligan told me that testimony about this would probably be more harmful than good. I don't know

why. This, Tom, was a very traumatized man. His nightmares did seem to cease for a while. Then he was reassigned to Vichansa, Italy and during that time his mom died. I still miss her today. Later after that tour, Tom got out of the military.

He was out for a year, but because it was a few days more then one year, he had to drop on rank. That was the rule. That year our son was born in Canada, November 6, 1971. Tom worked for Canadian Forrest Products, but could never get the military out of his head. So, we were reassigned to Fort Carson Colorado, Desert Training, the Fourth Infantry Division (mechanized) tanks. Sam was six weeks old and Tom was back to E-5, Buck Sergeant We were there for three years. We loved it in Colorado. Weak as my memories are, I only remember a few times with the nightmares. He would seemingly awake at night, but it was clear he wasn't seeing me; he was looking petrified and covered in sweat.

We were then after three years sent back to Ft. Lewis, Washington. We had a nice place on the Nisqually River. This was our last residence together for another three years. I don't remember his unit My feelings and thoughts from that time were pretty vague. I was in and out of hypochondria. Thank God no more. There were many arguments and silent periods, but nothing threatening.

He (Tom) came down on orders for Korea and then I met my second husband Robert Pfeifer. When Tom came home I had left where we lived in Nisqually and had filed for divorce and was living with Bob elsewhere with our son Sam. I'm quite sure he felt totally betrayed. Who

wouldn't. Later I saw Lorna once with her daughter from previous marriage with Tom when they came to pick up Sam for weekly visit. He had many opportunities to physically harm, either Bob or I. He knew where Bob worked. I received custody of Sam and later Robert adopted Sam.

The loss of Sam I know as terrible for him. He loves and loved Sam very much. And, I know he loves Steven Michael and Nicole – his kids.

To back track here, after the first time in Vietnam, Tom was set to Hawaii at Schoefield Barracks and then Ft. Lewis. We met in Vancouver B.C. Canada, through a mutual friend of his and friend of mine. We dated approximately nine months and then married. Five months later he was sent from Ft. Lewis, WA. to Vietnam for a year, back to Ft. Lewis, Vichensa, Italy and then out for a year – then Colorado, Ft. Lewis, and then Korea. I know that he went to Korea again because he called briefly to see how Sam and I were and that he had a new son Steven Michael. I never heard from him again and then my husband Robert and I were stationed in Germany for three years and then Hawaii for ten years. I am now permanently back in Canada. I am a citizen, and starting a single life permanently here. My son Sam is still back in Hawaii.

So I married Tom and divorced in October 1980. Tom married Lorna shortly after our divorce before Christmas, I believe. I married Bob January 31, 1981 and our divorce was final this past summer. Tom and I had a lot of life together.

The idea of lost and missing records is not new to me nor are medical records. During the 60's and 70's I discussed the subject, but mostly on a personal level. Information on specific tasks of duty-assignments L.R.R.P. is commonly known today and means Long Range Reconnaissance Patrols. Many and most are for the saving of life, but some are not and this is where Tom's second tour in Vietnam comes in. Tom had further training there, and when he notified me from Vietnam, I was in fear for his life all the time. Many ten-man team patrols were on assignments for eliminating North Vietnamese Regulars or sympathizers, sometimes in villages, so South Vietnamese, would often notify its military of the sympathizers. Over there, they would call them Assassination Patrols. As in any war, too many innocent die. They were trained to do their job with stealth, quickly, quietly, and retreat from their mission in as much silence as possible, then be debriefed. If the prosecution said Tom's actions were premeditated or planned, or because of jealousy, I have difficulty believing this, strictly on a factual basis, it does not make sense to me.

1) Why would he commit and plan a murder when he would be caught and announce it to a friend. "Mission accomplished Sir."

2) He wouldn't have attempted rationally to put himself in jail.

3) He wouldn't have attempted anything like that in the first place.

4) He wouldn't have, with any rationalism at all risked other relatives or children being there.

5) Especially the children.

I told Mr. Mulligan about the L.R.R.P. duty because Tom knew right from wrong. I told Mr. Mulligan that I didn't believe the premeditation then or the jealousy and I don't believe it now.

I asked Mr. Mulligan to relay a message to Tom, that I cared about his well being. I told him to relay I would testify or at least come, even just for moral support. Mr. Mulligan didn't ask much about Tom as a human being which I thought odd. I feel that Tom had an uncaring, incompetent defense. Because of what Mr. Mulligan didn't tell Tom, he assumed that he had told me what Tom had done, but that was all. Tom also thought I wasn't interested in communicating. Mr. Mulligan promised me he would let me know about Tom and testifying before the trial.

Sometime later I called Mr. Mulligan and was told the trial was over, and Tom was in Walla Walla prison and Mr. Mulligan was on holiday. I was furious.

I think it was the following year. I received a call from Satina Baja who said obviously that she was his wife and she had moved to the Walla Walla prison area. I'm glad she did. At least she let me know how he was. Not good. But, she gave me his address. I was glad someone was there that cared about him, and she gave me his address. Later our son Sam communicated with Tom and we relayed some thoughts. Sam also visited him at the prison on the Olympic Peninsula when he lived in Bremerton for awhile, and will do so again this Christmas before coming to see my dad and I. I also know that his son Steven cam to see Tom in Monroe and it was a very uplifting meeting. I also intend on going to see him after

Christmas. At least he knows he has two sons that love him.

Tom was a great lover of history, of Indian lore, and the useless loss of Indian Tribes in U.S. History. In earlier years he liked to laugh alot and talk with other people. He could be kind and compassionate. He took Sam everywhere with him he could and was a good dad. I only hope that somewhere in these notes, there is room for reasonable doubt.

Thank you for this chance to express some truth. I would testify to these facts in Court if asked.

Sincerely

Joya L. Pfeifer

/s/ Joya L. Pfeifer
JOYA L. PFEIFER

SUBSCRIBED AND SWORN to before me this 22, of January, 1997.

/s/ Tammy L. Hoolsema
Notary Public
TAMMY L. HOOLSEMA
residing at
203 – 3740 Chatham Street,
Richmond, B.C. V7E 273
Commission Expires No expiry

APPENDIX G

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the

right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by the State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under

this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal of State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.)

HISTORICAL AND STATUTORY NOTES

Senate Revision Amendments

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies of lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petition to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

1966 Acts. Senate Report No. 1797, see 1966 U.S. Code Cong. and Adm. News, p. 3663.

References in Text

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.